No. 82-1295

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ESCAMBIA COUNTY, FLORIDA, *et al.*,
Appellants,

v.

HENRY T. McMILLAN, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[redacted] BRIEF OF AMICUS CURIAE ORANGE COUNTY, FLORIDA IN SUPPORT OF THE APPEAL

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MOTION OF ORANGE COUNTY, FLORIDA FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE APPEAL

Pursuant to Rule 36 of the Rules of this Court, Orange County, Florida, a non-charter county, through counsel, seeks leave to file the accompanying Amicus Curiae Brief. This non-charter county is governed by the same constitutional and statutory provisions which heretofore have governed Appellant Escambia County, Florida ("Escambia"), and therefore, is impacted directly by the Fifth Circuit's decision invalidating, as applied to Escambia, Florida's constitutional requirements of at-large elections and reapportionment based on the one-person, one-vote

principle and especially the Fifth Circuit's decision narrowly interpreting the scope of Florida Constitution, Art. VIII § 1(f) and Florida Statutes, § 125.01.

Appellant Escambia County is a non-charter county. The questions in this case make the decision herein of enormous importance to the 61 other Florida non-charter counties who operate under the same constitutional and statutory provisions as Escambia County.

The decisions below have implications in Florida beyond Escambia in holding that, under Florida's Constitution, county commissioners in a non-charter county are powerless to enact a new election system where the county's existing election system has been held unconstitutional. This portion of the Court's decision was not limited to the facts of this case, but, rather, could be applicable to all non-charter counties in Florida.

It is the position of Amicus that Florida's Constitution and statutes give county commissions expansive powers including the power to enact a new election system where necessary to remedy a constitutional deficiency and this interpretation of Florida's constitution and statutes is binding upon this Court.

This brief is sponsored under Rule 36.4 of the Court by the undersigned authorized law officer of the named county political subdivision of Florida who has signed it and who desires to appear as Amicus herein in support of Appellants.

Accordingly Amicus seeks leave to file the attached brief under Rule 36 and particularly Rule 36.4.

Respectfully submitted,

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STATEMENT OF INTEREST OF AMICUS CURIAE

The focal point of this case is the alleged vote dilution which occurs in Escambia County, Florida by application in that county of Fla. Const. Art. VIII, § 1(e) and descendant Florida Statutes[1] enacted pertinent thereto.

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[1]Florida Statutes, Section 99.032, and Section 124.01 are clearly enacted by virtue of language originally present in Article VIII, Section 5 of the Florida Constitution of 1885 as amended in 1900. It is this constitutional language, as found in the present Florida Constitution, Article VIII, § 1(e), which the Federal Courts below found constitutionally offensive as applied in Escambia County.

However, as part of the relief stemming from the District Court's judgment and the opinion of the Fifth Circuit upholding the district court, there is now of record judicial authority that Fla. Const. Art. VIII, § 1(f), commonly known as the "County Home Rule" subsection, does not provide non-chartered Florida counties with sufficient authority to erect an alternative means of electing county commissioners when the operation of Fla. Const. Art. VIII, § 1(e) pertinent to the election of county commissioners and descendant statutes are suspended due to invalidity under the Federal Constitution.

The Federal Courts below have held this impotence arises from the absence of a specific state constitutional grant or statutory grant of such authority to non-charter counties. The logical extension of this decision results in an effective emasculation of the Home Rule provisions of the Florida State Constitution and, as such, is potentially dangerous to, and of great importance to, the vast majority of Florida's counties, which are not chartered.

The Board of County Commissioners of Escambia County enacted, by Ordinance 78-15, an ordinance providing for the election of seven county commissioners using a combination of five resident single member commissioners' districts and two commissioners to be elected from the county at large. This legislative action by the Escambia County board was in response to the Federal District Court's mandate to present a constitutionally valid plan of electing county commissioners and the ordinance was offered by the Board as a "legislative plan" in accord with this court's requirements enunciated in ***Wise v. Lipscomb.***[2]

[2] *Wise v. Lipscomb*, 437 U.S. 535, 57 L.Ed. 2d 411, 98 S.Ct. 2493 (1978).

The District Court found, however, that the proffered ordinance was not within the legislative authority of the board of county commissioners and, consequently, void.[3]

The Court of Appeals, upon its rehearing of this case reversed its earlier decision and held the at large method of electing county commissioners invalid in Escambia County and then agreed with the District Court's views as to the impotence of the Escambia Board of County Commissioners to enact a remedial ordinance erecting an alternative means of electing county commissioners. The reasoning of the Court of Appeals was the same as that of the District Court.[4]

Amicus curiae Orange County, Florida, is a non-chartered county, as are sixty-one other counties in Florida. Amicus here contends that Federal Courts below, in construing the Home Rule powers granted these non-chartered counties under Fla. Const. Art. VIII, § 1(f) of the Florida State Constitution, and the language of Fla. Const. Art. VII, § 1(e) have greatly minimized the grant of "Home Rule" power given these counties by the people of Florida. Amicus contends that the constitutional grants of power and the grant of power under Florida Statute, Section 125.01 provide ample authority to any non-charter Florida county in which the operation of the full language of Fla. Const. Art. VIII, § 1(e) and pertinent descendant statutes has been suspended by Federal Court order due to invalidity under the Federal Constitution. It is the purpose

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[3]Memorandum Decision of the United States District Court for the Northern District of Florida in *McMillan v. Escambia County, Florida,* PCA No. 77-0432 (N.D. Fla., Sept. 24, 1979), at page 68a, Appellant's Jurisdictional Statement.

[4]Decision on Rehearing of the Fifth Circuit in *McMillan v. Escambia County, Florida,* 688 F.2d 960 (5th Cir. 1982) at pages 25a through 29a, Appellant's jurisdictional statement.

of this Amicus brief to present argument of this point alone.

Further, Amicus submits that the construction given Fla. Const. Art. VIII, § 1(f) by the Federal Courts below is antithetical to the proper reading of the constitutional language and contrary to the result which would have been reached had the question been submitted to Florida courts.

Accordingly, Amicus respectfully seeks hearing by this court in order to put to rest the erroneous and unduly restrictive construction placed upon these important provisions of the Florida State Constitution by the Federal Courts below.

SUMMARY OF ARGUMENT

This Court in the *Virginia Coupon* cases, *Poindexter v. Greenhow,* 114 U.S. 270 (1885) 5 S.Ct. 903 29 L.Ed 185, and the Florida Supreme Court in *Town of Boynton v. State ex rel. Davis,* Supreme Court of Florida (1932) 138 So. 639, have both recognized the basic rule of constitutional and statutory construction that a statute (and presumably a state constitutional provision) may be perfectly valid applied generally but invalid as applied to one particular set of facts. The case at bar is a similar case of "occasional" unconstitutionality arising from application of an otherwise valid law to an isolated set of facts.

The language of Fla. Const. Art. VIII, § 1(e) coming from a 1900 amendment to the Florida constitution and Florida statutes descendant therefrom were found constitutionally invalid and inoperative in Escambia County due to the unusual sociological factors found extant there by the Federal Courts below. Thus, there is no constitu-

tionally offensive Art. VIII, § 1(e) language or statutes descendant therefrom operative in Escambia County with which an ordinance passed under the Home Rule powers of Fla. Const. Art. VIII, § 1(f) could be inconsistent. Consequently, there can be no Florida constitutional or statutory restraint upon Escambia County prohibiting it from choosing its own method of electing county commissioners.

Escambia's Board of County Commissioners chose by ordinance in 1978 to erect a method of elections which would utilize five district commissioners, each to be elected solely by the residents of the district, and two additional commissioners to be elected at large. Considering the judicial excision of the constitutionally objectionable language of Florida constitution pertinent to the at large election of county commissioners and the same excision of the Florida statutes descendant therefrom, there can be no source of inconsistency which would constrain the legality of the Escambia County ordinance and such local legislation should be permitted to stand.

ARGUMENT

A FLORIDA NON-CHARTER COUNTY IS EMPOWERED, BY "HOME RULE", TO ENACT BY ORDINANCE A METHOD OF ELECTING COMMISSIONERS OTHER THAN THAT SPECIFIED BY FLORIDA CONSTITUTION, ARTICLE VIII, SECTION 1(e) WHEN THE OPERATION OF THAT PROVISION IS FOUND CONSTITUTIONALLY INVALID WITHIN SUCH A COUNTY.

A. THE FLORIDA STATE CONSTITUTION EMPOWERS A NON-CHARTER COUNTY TO LEGISLATE BY ORDINANCE IN ANY PROPER AREA WHEN SUCH ORDINANCE IS NOT INCONSISTENT WITH GENERAL OR SPECIAL LAW.

Appellant Escambia County contends the finding of "vote dilution" by the Federal Courts below was improper both on the facts and under the existing law as enunciated by this Court. Amicus adopts and affirms the arguments put forward by Escambia in its jurisdictional statement.

Amicus Orange County, Florida here argues only that the interpretation placed upon the "Home Rule" provisions of Fla. Const. Art. VIII, § 1(e) by the Federal Courts below is unduly restrictive and wholly contrary to the purpose and intent of such provisions. The proper resolution of this question is of paramount importance to non-charter Florida counties. The decisions of the Federal Courts below have voided the provisions of the Florida Constitution and Florida Statutes which mandate an exclusively at large system of electing county commissioners in Escambia County. Thus, a temporary lacuna as to the method of election exists. The question presented to the Federal Courts below, and hopefully to be addressed by this Court, is whether such lacuna shall continue until and unless the Florida Constitution is amended and remedial statutes enacted subsequent to such amendment, or may

the citizens of the affected county, through their elected representatives, the county commissioners, cure the equal protection defect through remedial legislation addressed to the method of electing county commissioners and thus immediately restore local government to normalcy. Amicus contends the latter answer is surely preferable, especially in view of this Court's comments favoring a legislative solution to the problems of redistricting and reapportionment made in *Wise v. Lipscomb,* which pronouncement echoes the Court's earlier pronouncements made repeatedly on this topic.

That the operation of Fla. Const. Art. VIII, § 1(e) as it calls for at large election of county commissioners is unconstitutional and therefore void in Escambia County but yet remains valid and subsisting law applicable to all other non-chartered Florida counties is unusual but certainly not unique. This court has long endorsed, as in the *Missouri Rate Cases,*[5] the canon of statutory construction under which a statute (and presumably a state constitutional provision) may apply validly to the great majority of given sets of facts (such as counties with a relative homogenous sociological composition or other common sociological factors) and yet be unconstitutional in application to a similar set of facts (such as a county with a sociological composition and history such as Escambia's).

The provisions of the Fla. Const. Art. VIII, § 1(f)[6] which vest non-charter counties with the right to legislate in all areas of legislative concern to counties in manner not

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[5]Missouri Rate Cases, 230 US 474, 57 L.Ed. 1571, 33 S. Ct. 975; (1913).

[6]Article VIII, Section 1(f), Florida Constitution, 1968 Revision, reads:

Non-charter government. Counties not operating under

inconsistent with general or special law have been grievously misconstrued by the Federal Courts below.

Fla. Const. Art. VIII, § 1(f) correctly understood states that a non-chartered county may be delegated all powers of self-government except the power to legislate over municipal ordinances. The county may adopt ordinances in any area legitimately touched by local government, if provided by general law, so long as such an ordinance is not inconsistent with general or special law.[7]

In Escambia County, by order of the Federal Courts below, there is no Fla. Const. Art. VIII, § 1(e) language or

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> county charters shall have such power of self-government as is provided by general or special law. The board of county commissioners of a county not operating under a charter may enact, in a manner prescribed by general law, county ordinances not inconsistent with general or special law, but an ordinance in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict.

[7]Discussion of this construction of the subject constitutional languages found in *Commentary*, Article VIII, § 1(f) to the Florida Constitution, 1968 Version by Talbot "Sandy" D'Alemberte. These comments are found following many new or amended sections of the 1968 Florida Constitution in Florida Statutes, Annotated, West Publishing Co., St. Paul, Minn. The publishers at 25 F.S.A. page VII, describe the value of the comments as follows:

> An outstanding special feature appearing in these volumes consist of a general Introduction and of specific Comments under particular sections of the Constitution, prepared by Talbot "Sandy" D'Alemberte. The outstanding contribution made by the author to the successful drafting and adoption of the 1968 Revision is reflected in the knowledgeable and informative facts and analyses found in the Introduction and Comments. His academic background which included graduate study of constitutional history at the University of London, his authorship of various articles and commentaries, his legislative experience as a member of the Florida House of Represen-

descendant Florida statutory language which could be found objectionable under the Federal Constitution. Thus, there is *no* general or special law governing the methods of election of county commissioners with which an ordinance passed under the Home Rule powers of Fla. Const. Art. VIII, § 1(f) could be inconsistent. Consequently, there can be no pertinent Florida constitutional or statutory restraint upon Escambia County to legislate

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tatives, and his practical experience as a partner in the firm of Scott, McCharthy, Steel, Hector & Davis, in Miami, qualified him uniquely to undertake the preparation of this special feature.

Mr. D'Alemberte's comment to the 1968 Amendments to the Florida Constitution, Article VIII, § 1(f), found at 28a F.S.A. pages 270-1, states:

> Subsection (f). This subsection embodies several new provisions which were proposed in a different manner by the Constitutional Revision Commission. That recommendation was that "counties shall have the power of self-government except as otherwise provided by general or special law." The reverse is now the case under this subsection which provides that counties shall have such powers of self government as is provided by general or special law. Absent special or general legislation counties have no constitutional powers under this subsection. The first sentence in this subsection provides that powers may be delegated to county governments by general or special law. The second sentence is somewhat inconsistent with the first, however, in that the authority of the county commissioners in non-charter counties to enact ordinances shall be "in a manner prescribed by general law". In any case, county governments may be delegated or granted powers by the legislature to operate as self-governing units even to the extent of having jurisdiction over municipal ordinances when a charter is adopted (see next subsection). *Absent a charter, the county government may be delegated all powers of self-government except the power over municipal ordinances.* The county may adopt ordinances, if provided by general law, not inconsistent with general or special law. (emphasis supplied)

upon its method of choosing county commissioners provided it is given the power to do so by Florida constitutional or statutory authority.

The grant of "Home Rule" power given non-charter counties is fleshed out by various statutory enactments empowering county action in various spheres of local government. Paramount among these statutes is Florida Statutes, Section 125.01, which sets forth the principle powers of each non-chartered county's Board of County Commissioners which may be exercised in any proper area in fashion not inconsistent with general or special law.[8]

---

[8]Florida Statutes, Section 125.01 provides, in part pertinent to the issue herein:

> "125.01 Powers and duties.—
>
> (1) The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, *this power shall include, but shall not be restricted to,* the power to:
>
> (a) Adopt its own rules of procedure, *select its officers,* and set the time and place of its official meetings. . .
>
> (t) Adopt ordinances and resolutions necessary for the exercise of its powers and prescribe fines and penalties for the violation of ordinances in accordance with the law.
>
> (w) Perform any other acts not inconsistent with law which are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law. . .
>
> (3)(a) No enumeration of powers herein shall be deemed exclusive or restrictive, but shall be deemed to incorporate all implied powers necessary or incident to carrying out such enumerated powers, including, specifically, authority to employ personnel, expend funds, enter into contractual obligations, and purchase or lease and sell or exchange real or personal property.
>
> (b) *The provisions of this section shall be liberally construed in order to effectively carry out the purpose of this*

Among those powers specifically granted these boards is "the power to carry on county government," including the power to "select its officers".

The scope and sweep of the Legislative powers conferred on non-charter counties by virtue of Florida Statute, 125.01, has been indicated by the Supreme Court of Florida in the recent watershed case, *Speer v. Olson.*[9] In *Speer,* the Florida court held that a non-charter county has full power to legislate on a particular subject relating to self-government unless that particular topic has been preempted by the Florida Legislature by either general or special law. In *Speer,* the Florida court then proceeds to commend the legislation of Florida Statutes, Section 125.01 as eliminating the necessity of a non-charter county petitioning the Legislature for a special act granting the petitioning county the authority to legislate subjects for which it lacked specific statutory authority.[10]

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section and to secure for the counties the broad exercise of home rule powers authorized by the State Constitution. (emphasis supplied)

[9]*Speer v. Olson,* 367 So.2d 207, Florida Supreme Court, 1979.

[10]Id, at 367 So.2d 211:

(2) The first sentence of Section 125.01(1), Florida Statutes, (1975), grants to the governing body of a county the full power to carry on county government. *Unless the Legislature has pre-empted a particular subject relating to county government by either general relating to county government by either general or special law, the county governing body, by reason of this sentence, has full authority to act through the exercise of home rules power.* There is no statute, general or special, which either specifically authorizes or restricts Pasco County with respect to the issuance of general obligation bonds to acquire sewage and water systems and to pledge for their payment the net revenues to be derived from the operation of such facilities and ad valorem teaxes levied within the

The view of the Federal Courts below is that the legislative vacuum caused by the unconstitutionality of the at large method of electing county commissioners in Escambia County could be filled only by affirmative state action. However, in the case of Escambia County's affirmity, following this logic of the Federal Courts, the vacuum as to a method of choosing county commissioners could be filled only by adoption of a county charter by the Escambia County populace (thus vesting the board of county commissioners with what the Federal Courts viewed as "full" Home Rule powers in accord with Fla. Const. Art. VIII, § 1(g)) or amendment of Art. VIII, § 1(e) of the Florida Constitution. It is the view of the Florida court as stated in *Speer*, that this is precisely the type of wrong cured by the "Home Rule" provisions of Fla. Const. Art. VIII, § 1(f) and Florida Statute 125.01. These provisions read together enable a non-charter board of county commissioners to legislate on the method of choosing county commissioners when, as in Escambia County's case due to Federal judicial excision, there is no state constitutional provision or statute with which such an ordinance could be inconsistent.[11]

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area of the Unit. The first sentence of Section 125.01(1), Florida Statutes (1975) therefore, empowers the county board to proceed under its home rule power to accomplish this purpose. This was done by the enactment of the ordinance and the adoption of the bond resolution after the bond election.

[11] Id, at 367 So.2d 211;

The Florida Court, in *Speer*, outlined not only the scope of "Home Rule" powers but, by citing *State v. Orange County*, 281 So.2d 310 (Fla. 1973), illustrated the evils which the "Home Rule" provision of the Florida Constitution and Florida Statutes, Section 125.01, are designed to overcome, namely, the filling of a "legislative vacuum". The precise approach used in authorizing the proposed

B. THE COURTS BELOW STRUCK THE LANGUAGE OF THE 1900 AMENDMENT TO THE FLORIDA CONSTITUTION OF 1885 AS FOUND IN THE PRESENT FLORIDA CONSTITUTION AS CONSTITUTIONALLY OFFENSIVE. THE REMAINING LANGUAGE OF FLORIDA CONSTITUTION, ARTICLE VIII, SECTION 1(e) AND FLORIDA STATUTES, SECTION 125.01 PROVIDE RESIDUAL AUTHORITY TO A NON-CHARTERED COUNTY TO ERECT AN ALTERNATIVE MEANS OF ELECTION FOR COUNTY COMMISSIONERS.

There is no question under either Federal or Florida law that the judgment Federal Courts below finding the operation of the at large election provisions of Fla. Const. Art. VIII, § 1(e) and descendant Florida Statutes invalid in Escambia County terminated the operation of some por-

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bonds by Pasco County was previously employed in the case of *State v. Orange County*, 281 So.2d 310 (Fla. 1973). In that case Orange County, a noncharter county, enacted a home rule ordinance authorizing it to acquire and construct county capital projects and to issue revenue obligations to finance the cost thereof, payable from race track funds and jai alai fronton funds. This Court found that there was no prohibition to be found in the Florida Constitution or general or special law, but, on the contrary, that there was delegated authority for implementing by ordinance the issuance of the proposed bonds. This Court noted that the intent of the Legislature in enacting Chapter 125 was to obviate the necessity of going to the Legislature to get a special act passed authorizing bonds of the type proposed: "*Instead of going to the Legislature to get a special bill passed authorizing such building fund revenue bonds, the Orange County Commissioners under the authority of the 1968 Constitution and enabling statutes now may pass an ordinance for such purpose, as they did in this case, because there is nothing inconsistent thereto in general or special law*. On the contrary, there is ample delegated authority for such purpose. *The object of Article VIII of the 1968 Constitution was to do away the local bill evil to this extent.*"

tion of Fla. Const. Art. VIII, § 1(e) and its descendant Florida election statutes in Escambia County.

The question thus arises, under applicable principles of construction, as to precisely which provisions or what language of Art. VIII, § 1(e) is constitutionally invalid. This determination must be made in order to determine, first, the extent of the vacuum caused by such Federal judicial excision and, second, the perimeters of the remaining grants of constitutional and statutory authority.[12]

The present language of Fla. Const. Art. VIII, § 1(e) is clearly an amalgam of two components. First, the language of this subsection regarding the composition of the Board of County Commissioners as being five members, one from each of five equal and contiguous districts, all to be elected by the electors of the county at large, is clearly a restatement of the constitutionally mandated at large method of electing county commissioners which has been present in the Florida State Constitution since 1900.[13] The language added to this basic at large

[12]This Court construes a state constitution and state statutes in the same fashion as the state supreme court would. Thus, settled principles of construction endorsed by the Florida Supreme Court should be used in an aid to construction in this case. Florida law is settled that the common rules of construction as to statutes may be utilized in judicial interpretation and construction of provisions of the Florida State Constitution. *State ex rel. Moodie v. Bryan,* (1905) 50 Fla. 2973, 39 So. 929; *Mugge v. Warnell Lumber & Veneer Co.,* (1909) 58 Fla. 318, 50 So. 645; *Perry v. Consolidated Special Tax School Dist.,* (1925) 89 Fla. 271, 103 So. 639; *State ex rel. McKay v. Keller,* (1939) 140 Fla. 346, 191 So. 542.

[13]Article VIII, Section 5, Florida Constitution of 1885 as amended in 1900, read as follows:

> "Immediately upon the ratification of this Amendment the county commissioners of the several counties of this State shall divide their respective counties into five commissioners' districts, to be numbered respectively from one to

scheme extending this constitutional subsection by adding that the governing body of each county shall be (unless otherwise provided by county charter) the board of county commissioners composed of five members and serving staggered terms stemmed from the same popular source as Fla. Const. Art. VIII, § 1(g) creating general charter government as an alternative form of county government and is totally new to the 1900 Constitutional language found in Art. VIII, § 1(e).[14]

> five, inclusive, and each district shall shall be as nearly as possible equal in proportion to population, and thereafter there shall be in each of such districts a county commissioner, who shall be elected by the qualified electors of said county, at the time and place of voting for other county officers, and shall hold his office for two years. The powers, duties and compensation of such county commissioners shall be prescribed by law: Provided, that nothing herein shall affect the terms of commissioners holding office at the time of such division: Provided, further, that all vacancies occurring by limitation of terms, or from death, resignation or otherwise, before the election of 1902, shall be filled by appointment by the Governor, as now provided by law."

[14]Commentary, 1968 Florida Constitution, Article VII, § 1(e) Florida Statutes, Annotated, West Publishing Co., St. Paul, Minn. at 26 F.S.A. 269:

> Subsection (e). This subsection was taken with only one amendment from the Revision Commission recommendations. The amendment is the substitution in the last sentence of "residing in" for the word "from", recommended by the Commission. The difference here is that the new constitution would require that the county commissioners reside in the district which they represent.
>
> Basically, this subsection is a restatement of Article VIII, Section 5 of the 1885 Constitution. A significant change in the new section, however, is the provision in the first sentence that county charters may provide "otherwise". Under the 1885 Constitution, a different method of county government could only be provided by a special constitu-

It is patent that the Federal Courts below objected to and struck the 1900 at large election scheme from Art. VIII, § 1(e) as constitutionally invalid.[15]

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for the establishment of charter governments and subsection (g) provides for the county governments under a charter.

[15]Memorandum Decision and Judgment of the United States District Court for the Northern District of Florida in *McMillan v. Escambia County, Florida,* PCA No. 77-0432 (N.D. Fla. July 10, 1978), as found at page 74a, Appellant's Jurisdictional Statement:

"The board of county commissioners and school board election system had their genesis in the midst of a concerted state effort to institutionalize white supremacy. Until 1901, the county commissioners were appointed by the governor. The evidence shows that appointment was favored over election to ensure against the possibility that blacks might be elected in majority black counties. Efforts to keep blacks out of government at the county level began during Reconstruction and were greatly intensified during the state's "redemption" by white Democrats. To ensure that blacks were not elected in majority black counties, county commissioners were appointed by the governor from 1868 to 1901. The poll tax was instituted in 1889 to disenfranchise blacks. 1889 Fla. Laws, ch. 3850, § 1. Although black voter registration remained high, at least in some parts of the state, up until the turn of the century, enough blacks were disenfranchised to permit the state to allow at-large election of county commissioners, Fla. Const. Art. 8, § 5 (1901), and the members of the newly created boards of public instruction (counterpart of today's school boards). 1895 Fla. Laws, ch. 4328."

The same memorandum decision, as found at page 92a, Appellant's Jurisdictional Statement, states:

"The at-large requirements of the election system (both general election and primaries) of the board of county commissioners are based on the 1901 amendment to the Florida Constitution, Fla. Const., art. 8, § 5. The historical background of 1901 amendment includes a general pattern of disenfranchisement and other discrimination at the hands of the state. The other laws of the period relating to selection of commissioners – gubernatorial appointment prior to 1901 and single-member district white primary after 1907 – were clearly race related. The Jim Crow laws were also being instituted in the early 1900's. The sequence of testified that in Pensacola black registration was high in 1900, and it was only thereafter that they were effectively excluded from the political process."

It is equally obvious that there is no constitutional objection to the Florida Constitution definition of the Board of County Commissioners as the governing body of the County unless changed by county charter as found in Fla. Const. Art. VIII, § 1(e). Thus, in accord with settled rules of construction under Florida public law, this section of the State Constitution must be considered as still intact, valid and subsisting in Escambia County.

However, the constitutionally offensive language in Fla. Const. Art. VIII, § 1(e) and its descendant statutes which was struck by the Federal Courts below is but a small part of the Florida constitutional and Florida statutory grant of power to non-chartered counties vesting such counties with the right to hold and regulate elections to choose members of the board of county commissioners.

The Board of County Commissioners is defined as the governing body of a non-chartered county under the valid provisions of Fla. Const. Art. VIII, § 1(e) and given the power of "Home Rule" legislation under the provisions of Fla. Const. Art. VIII, § 1(f). The primary statutory grant of legislative power on local self government is found in Florida Statutes, Section 125.01 to which reference is made hereinabove. This statutory section vests the Board of County Commissioners with plenary power to legislate by ordinance on any conceivable topic of legitimate local self governmental interest so long as such county legislation is not specifically inconsistent with the Florida Statutes.

The Federal Courts below have effectively excised from operation the Florida constitutional provisions and descendant statutory language mandating the exclusive use of the at large method of electing county commissioners in Escambia County as contemplated by the language of Art.

VIII, Section 5, Florida Constitution of 1885, as amended in 1900. However, under the applicable canons of statutory construction, there remains an ample grant to non-charter counties of power within which the legislative authority of Escambia may erect an alternative and workable method of choosing county commissioners. This occurs under the canon of statutory construction which mandates the survival of constitutionally valid sections of a state constitution and state statutes after constitutionally invalid language has been struck. This canon is an ancient and basic principle of Florida public law.[16]

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[16] *Cramp v. Board of Public Instruction*, 137 So.2d 828 (Florida Supreme Court, 1962). *State ex rel. Boyd v. Deal*, 24 Fla. 293, 4 So. 899 (Florida Supreme Court, 1888).

CONCLUSION

For the reasons set forth hereinabove, the Circuit Court of Appeals decision appealed herein should be reversed and this court should properly construct the meaning and intent of Fla. Const. Art. VIII, § 1(f) and Florida Statutes, Section 125.01, read in *pari materia*.

Respectfully submitted,

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